No. 99.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE NINTH CIRCUIT.

Brief on Behalf of Defendant in Error.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA, (a Corporation),
Plaintiff in Error,

vs.

CORA E. NIXON,
Defendant in Error.

Error to the Circuit Court of the United States, for the District of Washington, Western Division.

Dearborn, Printer, Seattle. 2024

In the United States Circuit Court of Appeals, for the Ninth Circuit.

THE PACIFIC MUTUAL LIFE INSURANCE COMPANY OF CALIFORNIA (a Corporation),
Plaintiff in Error,
vs.
CORA E. NIXON,
Defendant in Error.
No. .....

Statement of Case.

To the statement made in the brief of plaintiff in error, the defendant in error adds the following:—

That under the pleadings in this cause, there were raised at least two distinct issues, viz:—

1.—That the defendant company, by its officers and agents, having authority so to do, extended the time for the payment of the second annual premium to October 31st, 1890, thereby waiving the forfeiture under the strict terms of the contract, and that the insured, during the said month of October, had attempted to pay said premium, but was unable to do so by reason of the fact that the local agent of the company could not be found, after repeated efforts.

2.—That so failing to find the local agent, the amount of the premium, $517.80, was paid by remittance through the bank to Edward C. Frost, the general agent of the

company at Portland, Oregon, who had full authority to receive the same; that the same was receipted for as such, and duly applied to the payment of said premium by said Frost; that the money had been thus retained by the company for a period of six months, and no effort made (as shown by the evidence) to return it or repudiate the payment till after the death of the insured; that the premium is still so retained, and that the company is and ought to be estopped from claiming a forfeiture under the strict terms of the policy, and has waived its right to insist upon a forfeiture.

There was a further reply setting up the non-forfeiture Act of 1872 of the Legislature of California, which was on motion stricken out, for the reason that if such a law was in force the Court would take judicial notice of it, and the same need not be pleaded. At the trial, the plaintiff below, having introduced the policy, and having shown by competent testimony the payment of the money to Mr. Frost, the general agent of the company, on October 31st, 1890, *to be applied as a payment of such premium*, and his receipt, so accepting it, as well as the contined retention of it, then attempted to prove the allegations, that the company had extended the time of payment through the month of October, and the unsuccessful attempts to make the payment by reason of the continued absence of the local agent, all of which, on the objection of counsel for defendant below, was excluded by the Court, so that, as stated by the eminent counsel for plaintiff in error, the issues thus limited were, whether the company had received the money, and by its acts, had waived the forfeiture, and was estopped.

The jury, under the instructions of the Court, found the issues in favor of the plaintiff below.

As is shown by the record, the defendant below did not make or tender any exceptions to the charge of the Court, or to any portion thereof, either orally or in writing, before verdict, as required by Rule 23 of the Circuit Court Rules of Practice. On the day *succeeding* the trial, one of the counsel for plaintiff below, without the knowledge or consent of his associates, signed a stipulation drawn up by opposite counsel, in which he inadvertently and unintentionally (as shown by his affidavit) agreed to waive the requirements of said rule, and extend the time, not only for the filing, but *making* exceptions. This stipulation and consent, so far as it attempted to authorize the *making* of exceptions out of time, was distinctly repudiated, and withdrawn by counsel for plaintiff below, before the day set for hearing the motion for a new trial, of which opposite counsel were duly notified. (Record, pp. 160-161.)

Hence all the exceptions to the charge of the Court, although incorporated in the bill of exceptions, against the objection and protest of counsel for defendant in error, and actually made long after the trial, should be ignored, and all of the assignments of error stated in the brief, from XI to XV, both inclusive, based thereon, should be disregarded.

The testimony of Frost, general agent (Record, p. 95, *et supra*), shows that the letter of October 23, 1890 (Record, p. 74), from his office, which was, in substance, a renewal of demand for payment, was duly authorized; and the testimony of Davis (Record, p. 97, *et seq.*) shows

that the money was remitted, received and applied to the payment of the premium, so far as Mr. Frost, as general agent, had authority, as between the company and those interested in the policy.

So that the whole case, as tried, rests upon these propositions: Was there a waiver, and was the money thus paid received by the company? Both of which, defendant in error contends, must be answered in the affirmative.

It is assumed, that in the consideration of this case, the entire testimony set forth in the record will be taken as incorporated in the bill of exceptions, as the same is called for therein, and that we shall not be confined to the partial statement set forth in the bill of exceptions. It was so understood when the bill of exceptions was settled.

Brief of Argument.

I.

The first assignment of error is groundless. The policy itself was admissible. It was fully and substantially pleaded in amended complaint, and the answer admitted, and in addition set up all the terms of the application for the policy (the same being a part of the contract) on which defendant relied as a defense, and those allegations were admitted in the reply. There was no necessity for the introduction of the "application." It had always been in the possession of defendant, and no issue was raised as to its contents or the legal effect of its obligations as a part of the contract.

Ins. Co. vs. Robertson, 59 Ills., 123.

The provision therein contained, that the policy should become void if the premium should not be paid, "as provided therein" was also inserted in the policy itself.

So that the defendant had the full benefit of all of its provisions involved in this controversy. There was nothing in the application which was relied upon as a defense that was not before the Court in the pleadings as facts alleged and admitted. The defendant's rights were neither affected nor impaired by the failure to introduce the "application."

As to the second assignment of error,—the refusal of the Court to grant a non-suit,—it is sufficient to say that this question of practice is settled by repeated decisions.

Motion for non-suit is not proper.

N. P. R. R. Co. vs. Charless, 2 C. C. A. Rept., 390 and authorities cited.

Oscanyan vs. W. R. Arms Co., 13 Otto 261.

Ins. Co. vs. Unsell, 144 U. S. 439.

The defendant, if it intended to stand upon the case made by the plaintiff's evidence, should have moved the Court for a peremptory instruction, and appealed from an adverse decision, without introducing testimony in its own behalf, but it failed to do this. Having gone into its defense by introducing testimony covering the whole case, it would be held to have waived its exception had the proper motion been made and denied.

Robertson vs. Perkins, 129 U. S., 233.

R. R. Company vs. Charless, 2 C. C. A., Rept. 391, and authorities cited.

However, if this were an open question, we think the Court below was fully justified in sending the case to the jury. To do otherwise would have been an usurpation of the province of the jury.

Leaving out of consideration all questions as to extension of time by the company, and the efforts to make payment prior to the actual date of payment, the fact clearly stands forth that the premium was paid, as such, and accepted as such, by the general agent, who had authority so to do. The money was transmitted by the following telegram addressed to Ladd & Tilton, bankers, etc., by the Merchants National Bank of Tacoma, for Mrs. Nixon:

"October 31st, 1890.

"LADD & TILTON, Bankers,

"Portland, Oregon:

"Pay to Edward C. Frost, agent, $517.80, account "Thomas L. Nixon policy, Friday, 12 o'clock noon." (Record, page 98.)

The receipt for same was as follows:

"Portland, Oregon, Oct. 31st, 1890.

"Received from Ladd & Tilton, bankers, five hundred "seventeen 80-100 dollars, for account Thomas L. Nixon "policy, per telegraphic instructions from Merchants "National Bank, Tacoma, 10-30, 1890.

"EDWARD C. FROST, Agent."

(Record, p. 74, Exhibit "B.")

This money was retained by him for the company from October 31st, 1890, till May 1st, 1891 (fifteen days after the death of the insured, being altogether a period

of over six months), at which time an attempt was made to refund it in order to escape liability. The position taken by the company was that its agent could hold this money indefinitely. If Nixon got well, it would keep it and reinstate him; if he died, it would refund it and shield itself under the provision of the policy pleaded by defendant,—"that no alteration or waiver of the conditions of this policy shall be valid unless made in writing at the office of said company in San Francisco, and signed by the president, or vice-president, and secretary, or assistant secretary."

It is clear that the defendant company had full knowledge of the receipt of this premium by Frost, its general agent, and the terms on which he received it, and of his retention of it for its benefit, as was shown by his subsequent testimony on cross-examination after he testified in behalf of defendant. The knowledge of the agent is the knowledge of the company, particularly of all facts which it was his duty to communicate to his superior officers.

> Ins. Co. vs. Bank of Pleasanton, 31 Pac., 1069.
> See McGurk vs. Ins. Co., Book I Lawyers' Reports Annotated, p. 563, and numerous decisions referred to in notes appended thereto.

It is true that this payment was made 30 days (not 61 days) outside of the literal terms of the contract, as the contract gave 30 days grace if insured was living, yet it was received and kept by a general officer of the company, with the knowledge of the company, till after the death of the insured.

The money was sent explicitly as a payment of the premium, and so acknowledged by the general agent, of which the company had notice. If it desired not to be bound by the act of its agent, it should have promptly repudiated it, and require him to refund it at once, but it acquiesed.

Qui tacet consentire videtur, ubi tractatur de ejus commodo; 9 Mod., 38.

Upon this state of facts, the plaintiff not only had a right to go to the jury, but was entitled to a verdict.

The scope of this authority as general agent could not be fixed by his declarations on the witness-stand, but will be presumed to be coextensive with that of the chief officers of the company within the limits of the territory assigned to him.

See authorities *infra*.

The question here is not the effect of non-payment of the premium on September 1st, or October 1st (the end of 30 days grace), but of its payment on October 31st, and the acceptance and retention of it by the company ever since.

Hence the authorities cited favoring a forfeiture are not in point.

A careful reading of Ins. Co. vs. Statham, 93 U. S., 24, will show that the only points decided were, first, that the existence of war which prevented the payment of premiums afforded no legal excuse for non-payment; second, that plaintiffs were entitled to recover to equitable value of the policy. In addition to this, Mr. Justice Bradley gives us a learned dissertation upon the theory

and practice of the business of life insurance, which we respectfully insist is purely *obiter*, and from which four of the judges dissented. This *dictum*, quoted in the brief of counsel, has since been repudiated.

The same may be said of Klein vs. Ins. Co., 104 U. S., 90, which merely followed the Statham case. In Wheeler vs. Conn. Mutual Life, the question was, whether insanity excused payment, and the further decision in that case is exactly opposite to that of the Statham case. With the New York Court of Appeals, the existence of war constituted a good excuse for non-payment.

In all the cases cited by counsel for plaintiff in error, there was a clear default and no payment whatever. In the case at bar, there *was* a payment and the same was made under an extension of time. The authorities cited by counsel are not in point.

Counsel says in his brief, "It was a California contract, made and executed in the City of San Francisco," and proceeds to invoke the law of California as controlling the pleading and practice in this case, tried in Washington.

It is true that the "application" contained this clause, "The contract of insurance when made shall be held and construed at all times and places to have been made in the City of San Francisco, in the State of California." Yet we respectfully dissent from the views of opposite counsel as to the effect of this. Whatever that may be, it surely could not alter the practice and procedure in the State of Washington, or give to the California Code any extra-territorial force. It was the duty of the Court

to construe the contract, as in all such cases. It did so, and there is no ground of complaint on that score.

But, as a matter of fact, the evidence shows conclusively that the policy was bargained for, delivered, and the first premium paid in Washington Territory. It was not therefore, in fact, a "California contract."

Equitable Life Ins. Co. vs. Pettus, 140 U. S., 226.

But we fail to see any necessity for this discussion. The rule invoked in the citation by counsel of the California Code is one which obtains in all our Courts independently of any such statute.

The third and fourth assignments of error were the exclusion of Fleming's testimony, tending to prove that within the 30 days grace allowed for payment of premium, Nixon stated to him, "that he did not intend to pay the premium, but proposed to let the policy lapse."

This was utterly immaterial, if true. It was only indicative of an intention which might change during the period of grace. The beneficiary, Mrs. Nixon, had a right (which she exercised) to pay this premium. Payment by a stranger, if accepted, would be good. The fact that the money was paid and accepted by the company is conclusive. Besides, the testimony was inadmissible under Sec. 1646, 2 Hill's Code, Washington, Nixon being dead, and this objection was made at the time. (Record, p. 105.)

The refusal of the Court to give the second instruction asked by defendant is the fifth assignment of error.

The only objection urged here by counsel for plaintiff in error is that the Court did not tell the jury that this

was a "California contract," and that "the rights of the parties thereunder were governed by the terms of the contract and the laws of the State of California."

If this instruction had been given, it is difficult to perceive how it would have aided or enlightened the jury.

"California contracts" may have some peculiar significance and force when made with corporations in that State, but we doubt whether that extends beyond the limits of that commonwealth.

The sixth assignment of error is fully met by the fact that the Court charged the jury that the "application" (which was read to the jury), with all it contained, was a part of the contract.

The seventh and eighth assignments of error misstate the issues in the cause. They say, "the only issue is whether the second premium was paid according to the terms of the policy or contract," that is, on September 1st, 1890, or within 30 days from that date.

This was not the issue raised by the pleadings. It would have been, under the testimony, a declaration that a payment made after maturity, accepted and retained by the company, had no effect in keeping the policy in force. Such is not the law.

As regards the ninth and tenth assignments of error, the Court, in its charge, substantially adopted all of the prayer of the eighth instruction, except that portion which declared that, under the laws of California, the provision for the payment of the premium when due "was a warranty that the premium should be so paid, and that a failure of this provision rendered the contract void under the Statutes of California, as well as under

the provisions of its own terms found on its face." The authorities cited by us constitute a sufficient reply to this. Such an instruction, as also the ninth prayed for, utterly ignores the issues raised by the pleadings on which the case was tried, and amounts to an instruction to the jury to find a verdict for defendant.

The several other assignments of error, from XI to XV, both inclusive, constitute an attack upon the charge of the Court, to which, as we maintain, no exceptions were made at the trial. And exceptions subsequently made can not be considered here.

Life Ins. Co. vs. Snyder, 93 U. S., 393.
Stanton vs. Embry, Ibid. 548.
M. S. vs. Carey, 110 U. S., 51.

The substance of the charge here complained of, is that an actual payment of the premium to the company after maturity, received and retained by it, is a good payment; that the acts of the general agent within scope of his authority were binding on the company; that his acts outside of his authority known and ratified by the company in accepting the benefit of such acts, and not repudiated by the company, bound it as if authorized; that the general agent, Frost, had no right to receive or retain the money for any other purpose than that for which it was sent, but that if he promptly notified plaintiff that the money would not be so applied, the company would not be bound; that if he retained it after demand for its return, with the knowledge of the company, the latter would be bound by his acts, unless promptly repudiated, and the money would be considered

as held by the company according to the terms of its transmission, as a payment of the premium.

It would be difficult to conceive a more logical and correct statement of the law of this case, as applicable to the testimony, than that which is set forth in the charge of the Court.

As to the XVI assignment of error:

Numerous and repeated decisions of the Supreme Court have established the rule that the action of the Court below in refusing a new trial is not subject to review in the Appellate Court.

Among the later cases on this point are:

Fishburn vs. Railway Co., 137 U. S., 60,

Construction Co. vs. Fitzgerald, Ibid. 98.

The argument of counsel for plaintiff in error states two propositions only.

1st.—That no payment of the second premium having been made or tendered prior to October 1st, 1890, the date of the expiration of the 30 days of grace, *ipso facto*, the policy became void under the terms of the contract.

2d.—That it not having been shown that a distinct waiver of the condition as to prompt payment had been made "*in writing, at the office of the company, in San Francisco, signed by the president or vice-president, and secretary, or assistant secretary,*" no such waiver was or could be made by any other agent of the company, that would be binding upon the company, although the company had knowledge of and acquiesced in the acts of such agent; that the method of waiver by the chief officers of the company in *writing* was exclusive.

As to the first proposition: It evades the real issue. The question presented upon the pleadings and testimony in the cause is, whether the agents of the company having, with the knowledge of the company, given an extension of time, a payment made out of time, but within such extension, and received and accepted by the company and retained by it till after the death of the insured constituted a waiver and a payment. We will discuss this further on.

As to the second proposition: It is admitted that no *written* waiver by the president or vice-president, secretary or assistant secretary, as above set forth, was ever made. But defendant in error insists that the acts of general agent Frost, within the broad scope of his authority, were such as to constitute a waiver, and that the payment to and receipt by him of the premium, with the knowledge of and acquiescence by the company, till after Nixon's death, is conclusive.

The situation was this: The advice of the local agent, whether right or wrong, whether authorized or not, was to the effect that the premium might be paid at any time during October. This testimony was excluded, but we refer to it for the purpose of the argument. Relying upon this, Mrs. Nixon arranged for the payment, but after fruitless search failed to find the agent. At this juncture a letter is received from general agent Frost, dated October 23d, 1890, saying: "I find, upon examination of our records, that your life premium in amount, $517.80, has not been received at this office. As this directly affects your interest, will you kindly notify me

by return of your intentions, and oblige, yours very truly, Edward C. Frost." (Record, p. 74.)

This, to an ordinary mortal, not versed in the methods peculiar to the business and practices of life insurance companies, was not only a confirmation of the statements of the local agent, but a direct invitation to pay the premium. A further search for the local agent proving fruitless, Mrs. Nixon transmitted the money through the bank to the general agent, as a payment of the premium.

As shown by the evidence admitted over the objection of plaintiff, the agent, Frost, after he had received and receipted for the premium sent by Mrs. Nixon, "as per telegraphic instructions," wrote a letter to Mr. Nixon (p. 65, Record), in which he announces that he will hold the money "in trust" for him, and encloses blanks to be filled. The witness there stating the contents of the enclosures, to the admission of all which plaintiff objected and excepted, on the ground that the same was irrelevant and immaterial, and that Nixon being dead, the witness could not be heard to testify as to any transactions between them.

On cross-examination, Mr. Frost testified that he received the money, knew that it was sent to be applied as a payment of that premium, and that he had no authority from either Mr. Nixon or Mrs. Nixon to hold or dispose of the same for any other purpose. (Record, p. 115, *et seq.*) He further says (Record, p. 117) that he deposited the money remitted to pay this premium to the credit of his account, *as general agent of the company*, where it remained till he undertook to return it, on May 1st, 1891, by registered letter, after the death of Nixon,

and then without authority, on his own motion, deposited the money in bank at Portland to credit of Mrs. Nixon, where, doubtless, it has since remained.

He further testifies (p. 122, Record) that he made monthly settlements with the company as its general agent, of receipts and disbursements, and remitted balance due.

Whether as a fact he remitted this particular amount into the company's strong box, in San Francisco, is immaterial, Its retention in his general agency account in the bank at Portland was sufficient. If he had suddenly died or resigned, the company could have claimed it of the bank. Besides all this, in his letter of April 30th, 1891, to Mrs. Nixon (Record, p. 77), wherein he attempts to absolve himself from all responsibility, he says: "I have carefully and thoroughly submitted all the facts, correspondence, etc., in this case to the home office," * * * showing conclusively that the company was fully advised, not only of his letter of October 23d, 1890, suggesting payment, but of the remittance, the terms thereof, its acceptance and retention.

The reasonable presumption is that these facts came to the knowledge of the company in the regular course of business as they transpired.

It further appears that this money was retained without further comment or explanation, from the date of its receipt till after the death of Nixon, a period of six months, except that Mrs. Nixon, in ignorance of her rights, wrote to Frost under date of December 22d, 1890 (Record, p. 75), to return the money, *if he did not intend to accept the premium on the policy*, to which he

replied, December 26th (Record, p. 78), suggesting that Mr. Nixon be examined for reinstatement, but saying substantially, that he would return the money if desired, but in such case she would "forfeit her right to restore the policy to risk." To this there was no reply and nothing further occurred till after the death of Nixon, which occurred nearly four months afterwards.

The reasonable inference from all this is, that the company intended to treat this as a payment. If not that, then it intended to hold the matter in such shape that if Mr. Nixon recovered his health it would retain him as a policy-holder, but if he died, the obligation could be denied, and the company could shelter itself from liability by subsequently repudiating the acts of its general agent, done with its knowledge and approval, and by pointing to its talisman, italicized in the brief of its learned counsel, "*that no alteration or waiver of the conditions of this policy shall be valid unless made in writing, at the office of said company in San Francisco, and signed by the president or vice-president, and secretary or assistant secretary.*" This talisman is always kept ready for use and unimpaired by the president and secretary.

Whatever might have been the individual views of agent Frost, it was the clear duty of the company to refund the premium as soon as it was received, if it did not intend to apply it as a payment. Good faith would admit of nothing short of that. This was not done, even after she had conditionally demanded its return. The result is that the company waived the condition as to

prompt payment, and is estopped from a denial of liability.

Upon this question of fact, the actual payment to and the retention of the money by the company, or to its agent, with the knowledge of the company, the decision of the case depended.

The Court instructed the jury, among other things, that the burden was upon the plaintiff; "that she must prove that she actually paid the money, and that the company got it." The Court also further charged the jury that if the money was received by the agent for the company, which he was not authorized at the time to receive, and yet, if he retained and applied it to the use of the company with the knowledge of his superior officers in the company, and if they failed to notify plaintiff that the payment was not approved or received by the company, and failed to return the money, if they received it, then this would amount to a ratification of a previously unauthorized act, and would be as binding as if it had been authorized.

Also, that if plaintiff did notify Frost that the certificates of health could not or would not be furnished, and ask for the return of the money, and it was retained by Mr. Frost, with the knowledge of his superior officers in the company, then he could not be held as acting as agent or trustee for the plaintiff in holding the money, but it would be regarded as money received and retained by the company, and bind it to make an application of it as a payment in accordance with the instruction of plaintiff in sending it.

These questions were submitted to the jury, and they found them in favor of plaintiff.

The charge of the Court covered the whole case and correctly laid down the law applicable to the facts developed in the testimony.

The learned counsel for plaintiff in error, in declaring that "there was absolutely no evidence in the case which would either warrant or justify the Court in suggesting to or instructing the jury what would be the legal consequence if the money had been received or retained by the company, or by any of its principal officers," etc., has inadvertently, we think, misstated the clear meaning of the charge, taken as a whole. And he must have forgotten the undisputed points of testimony showing the payment to the general agent for a specified purpose; his receipt of the same; his deposit of the money with other funds of the company in bank, to his credit as general agent; the retention of it, and failure to return it when demanded, and the contemporaneous knowledge of all these facts by his superior officers, who, as he says, "approved" his acts.

If the doctrine insisted upon by the plaintiff in error in this case shall be established as a precedent, then, no policy-holder will be safe from the time he has paid his premium till another is due. All that will be necessary to destroy his rights by forfeiture, is a little secret collusion between the agent, who has no authority to waive a condition, and the chief officers of the company, who have such authority but never commit themselves in writing.

Counsel for plaintiff in error insists that parties may agree for a lapse of policy on non-payment of premium when due ; that a tender of payment after a forfeiture, which is refused, will not make a waiver ; that sickness and disability will not excuse non-payment, and that the insured is chargeable with knowledge of provisions in his contract.

We agree to all this, and do not criticize the authorities cited. But this is not the issue. The proposition is correctly stated in a case cited by him,—Thompson vs. Life Ins. Co., 104 U. S., 252. In that case, Justice Bradley says : "If a forfeiture is provided for in case of non-payment at the day, the Court can not grant relief against it. *The insurer may waive it, or may by his conduct lose his right to enforce it.*" Aside from the issue tendered by plaintiff below, in reference to the extension of time of payment, and the consequent waiver thereby of prompt payment, the only issue is whether the acceptance and retention of the premium after due by the company, or by its agent with the knowledge of the company's chief officers, was a waiver of prompt payment provided for in the contract?

Upon this question and others connected therewith, we submit the following points and authorities :—

The receipt of a premium on a policy after forfeiture, with knowledge of the facts, is a waiver of the forfeiture.

Viele vs. Germania Ins. Co., 26 Iowa, 55.
Aetna Ins. Co. vs. Maguire, 51 Ills., 242.
Mut. Ben. Life vs. Robertson, 59 Ills., 123.
Trager vs. La. Equitable, 31 La. Ann., 235.

Southern Co. vs. Booker, 9 Heisk., 606.
Schmidt vs. Charter Oak, 2 Mo., App., 339.
Walsh vs. Austin, 30 Iowa, 133.
Ins. Co. vs. McCain, 6 Otto, 84.
Phœnix Ins. Co. vs. Boyer, 27 N. E., 628.
Arnott vs. Prud. Ins. Co., 17 N. Y. S., 710.
De Frece vs. Natl. Life, 19, N. Y. S., 8.

In the note to Viele vs. Germania Ins. Co., *supra*, it is said, "This valuable case contains, it is believed, the most complete and comprehensive view to be found in the decisions of the Courts of the law of waiver of conditions, or of forfeiture by breach of conditions, in policies of insurance."

In that case the Courts say, *inter alia*, that the breach of conditions in the policy by one party does not render the contract *void*, but voidable only, as the other party may waive the forfeiture and treat the contract as binding.

That the waiver need not be in writing.

That acts and declarations, whereby the party was induced to believe that the condition was dispensed with or forfeiture, will be sufficient to preclude the setting up breaches of the condition as a defense.

That the receipt of premium upon a policy after forfeiture is a waiver thereof (citing authorities.)

That an agent with general powers has authority to dispense with conditions and waive the effect of breaches thereof.

As to the power of a general agent to waive a forfeiture:

Ball vs. Ins. Co., 20 Fed. Rep., 232.

Ins. Co. vs. Hayden, 13 S. W., 585.
Murphy vs. Southern Co., 3 Baxter, 440.
Dilleber vs. Knickerbocker Co., 76 N. Y., 567.
Piedmont & Arlington vs. McLean, 31 Gratt., 517.
Ins. Co. vs. Friedenthal, 27, Pac. 88.
Penn. Mut. Life vs. Keach, 26 N. E., 106.

Waiver by ratification of act of agent in receiving premium:

Wyman vs. Phœnix Ins. Co., 119 N. Y., 274.
Piedmont & Arlington vs. Lester, 59 Ga., 812.
Mound City Mutual vs. Huth, 49 Ala., 529.

Denial of liability after notice of death is a waiver of proof of loss:

Van Kirk vs. Ins. Co., 48 N. W., 798.
Phœnix Ins. Co. vs. Batchelder, 49 N. W. 217.
Germania Ins. Co. vs. Gibson, 14 S. W., 672.

The company must declare a forfeiture by some affirmative act, as the provision is made for its benefit:

Ins. Co. vs. French, 30 Ohio St., 240.
Bouton vs. Ins. Co., 25 Conn., 542.
Joliffe vs. Ins. Co., 39 Wis., 117.

If the foregoing authorities establish the propositions contended for by us, there is nothing left open for the contention of plaintiff in error.

The jury has affirmatively passed upon the issues of fact as to the payment of the premium by the plaintiff as such; its receipt and appropriation by the company, and its retention of the same for months after the conditional request to refund it.

It is well settled that this Court will not weigh the evidence.

Ins. Co. vs. Ward, 140 U. S., 76.
N. P. R. R. Co. vs. Charless, 2 C. C. A., 398.
Unsell vs. Ins. Co., 144 U. S., 439.

It is suggested that the verdict is partisan. That suggestion is always made in cases of suits against corporations when the plaintiff below is defendant in error. But it seems to us that no jury would have acted differently under such testimony, and especially when, by the charge of the Court, the defendant's theory was strongly and squarely presented.

In conclusion, it is respectfully submitted that the charge of the Court fairly presented the issues to the jury, so far as the defendant below was concerned, and as to it, fairly and correctly stated the law. That the verdict is responsive to the charge and sustained by the evidence; that there is no reversible error in the record, and that the judgment should be affirmed.

W. S. RELFE,
For Defendant in Error.